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Summit Streams Sdn Bhd (in winding up) v Yayasan Selangor (Sap Ulu Yam Sdn Bhd (in liquidation), intervener)

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCvC-443-09 OF 2018
TEE GEOK HOCK JC
16 DECEMBER 2021

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Contract — Specific performance — Sale and purchase agreement — Failure to pay balance purchase price although extension of time granted — Whether purchaser acted in breach of sale and purchase agreement — Whether purchaser ought to be granted equitable remedy of specific performance — Whether purchaser entitled to damages in lieu of specific performance — Whether purchaser could claim for refund of deposit — Purchaser contracted to buy subject land on 'as is where is' basis — Whether purchaser could demand for improvement of terms not stipulated in agreement — Whether time for completion of sale and purchase transaction set at large — Whether termination of agreement valid and lawful — Whether cause of action barred by Limitation Act 1953

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Companies and Corporations — Winding up — Suit by company — Absence of valid sanction by Malaysian Department of Insolvency to commence and maintain suit — Whether wound up company had locus standi to commence suit

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This suit arose from a sale and purchase agreement relating to a land ('the said land'). The agreed price in the sale and purchase agreement was RM4,827,600. The sale and purchase agreement were signed by SAP Ulu Yam Sdn Bhd who purported to act as the attorney for the landowner Yayasan Selangor as the vendor and Summit Streams Sdn Bhd as the purchaser. After having granted nine extensions, Summit Streams Sdn Bhd failed or neglected to pay the balance 90% price, and eventually Yayasan Selangor terminated the sale and purchase agreement. Both SAP Ulu Yam Sdn Bhd and Summit Streams Sdn Bhd (in liquidation) had since been under wound up. In the present suit, Summit Streams Sdn Bhd (in liquidation) ('the plaintiff') had initially sued Yayasan Selangor ('the defendant') for specific performance of the sale and purchase agreement, or in lieu thereof alleged damages for termination in the amount of RM189,820,260 or alternatively refund of deposit and interests allegedly agreed during a mediation. By leave of court, SAP Ulu Yam Sdn Bhd (in liquidation) ('the intervener') was allowed to be an intervener. In the present suit, the plaintiff argued that the time for completion was at large, and that the defendant had, according to the plaintiff, wrongfully terminated the SPA. The plaintiff also argued that there should be an order of specific performance of the

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A sale and purchase or alternatively the deposit and interest paid under the sale and purchase agreement should be refunded to the plaintiff. On behalf of the defendant, it was argued that: (a) the plaintiff had no locus standi to commence the present suit because of the absence of a valid sanction by the Malaysian Department of Insolvency for the plaintiff; (b) the plaintiff's cause of action in the present suit was barred by limitation period and/or barred by laches; (c) the SPA was signed by the intervener as the beneficial owners and not by the defendant's authorised representative or agent; (d) time under the SPA was not set at large and as the plaintiff failed or neglected to pay the balance price by the extended date for completion, the defendant validly terminated the SPA; and (e) the plaintiff was not entitled to the equitable remedy of specific performance and damages. The issues that arose for determination were: (i) whether the plaintiff had locus standi to commence the present suit; (ii) whether the plaintiff's action was barred by limitation period and/or by laches; (iii) whether the defendant's termination of the sale and purchase agreement was valid; and (iv) whether the plaintiff could claim for refund of deposit.

Held, dismissing the plaintiff's claim:

(1) In initiating this action ('Suit 2018'), the plaintiff relied on the sanction issued by the Malaysian Department of Insolvency ('the MDI') for the purposes of filing and maintaining a suit against Yayasan Selangor and SAP Ulu Yam Sdn Bhd. Subsequent to obtaining MDI's sanction, the plaintiff commenced a suit in the High Court ('Suit 2017'). In the circumstances, the MDI's sanction was specifically for the Suit 2017 and had in fact been utilised and spent for the Suit 2017. When the plaintiff filed the present suit in September 2018 against Yayasan Selangor as the sole defendant, there was no prior written sanction of the MDI for the commencing of the present suit. A sanction for a bankrupt or a wound up company to commence a court suit must be specific and was not meant for multiple proceedings. As there was no specific written sanction from the MDI for the commencement of the present suit, the present suit filed by the plaintiff was null and void ab initio. Thus, the plaintiff's present suit should be dismissed and/or struck out (see paras 34–36, 39 & 41–42).

(2) In the present suit, the last extension of time (the ninth extension of time) granted to the plaintiff expired on 31 December 2011 and when the plaintiff still failed or neglected to pay the balance price, the plaintiff was notified vide letter dated 26 March 2013 that the sale and purchase agreement shall be terminated unless the balance price was paid by 31 March 2013. Irrespective of whether the cause of action in specific performance accrues on or shortly after 31 December 2011 (the date of expiry of the last extension of time) or on 31 March 2013 (the ultimatum of the grace period), the plaintiff's cause of action was still barred by the

Limitation Act vis a vis the intervener. A court of equity could not grant an equitable remedy against the nominal defendant (ie Yayasan Selangor) to compel specific performance of a contract which deprived the real and substantive defendant (SAP Ulu Yam Sdn Bhd) of the latter's beneficial ownership to the subject-land in a situation where the plaintiff's cause of action was barred by limitation period vis a vis the real and substantive defendant. It would be inequitable or unjust for the plaintiff to be allowed to circuitously circumvent the limitation period vis a vis the real and substantive defendant by indirectly suing the nominal defendant and bypassing the real and substantive defendant. In the circumstances, the plaintiff's cause of action accrued in the middle of year 2011 and therefore the present suit filed in September 2018 was barred by the Limitation Act 1953, being filed well after six years from the middle of year 2011 (see paras 49–51).

(3) A party who sought the equitable remedy of specific performance should pursue the matter with diligence and expedition. In the circumstances of the present case, the delays of years to the completion of the sale and purchase transaction were due to the plaintiff's repeated and prolonged refusal to pay the balance price until and unless the plaintiff could obtain its planning approval for its unilateral post-contract extraneous terms of developing the subject-land into a burial ground to suit its own commercial purpose. The plaintiff's unilateral imposition of obtaining the planning approval for cemetery or burial ground was unreasonable and was not part of the terms of the sale and purchase agreement. The plaintiff had adamantly refused or failed to pay the balance price despite the lapse of about nine years. In the circumstances, the plaintiff had been guilty of laches and was therefore not entitled to any assistance by the court of equity. Therefore, the plaintiff's action for specific performance should be dismissed (see paras 52, 57 & 59–60).

(4) Under the terms of the sale and purchase agreement, the plaintiff had to pay the balance price within the contractually agreed time and then take the subject-land 'as is where is' irrespective of whatever future development plan or theme of development it had and irrespective of whatever zoning which the government authority may have for the subject-land. On the facts of the case, the plaintiff had not pleaded a case of frustration of contract due to supervening change of a fundamental term such as change of category of land use by the government authority contrary to the contracting parties' contemplation at the time of making the contract. As such, there was no basis whatsoever for this court to consider whether or not the deposit and interest paid ought to be refunded on ground of frustration of contract (see para 66).

(5) There was no culpable delay on the part of the vendor in respect of the completion of the sale and purchase transaction. The vendor at all

material times before the termination of the contract was ready and willing to do its part in the completion of the sale and purchase transaction if the plaintiff were to pay up the balance price and the overdue interest. In the circumstances, the court rejected the plaintiff's contention that the time for completion of the sale and purchase transaction was set at large (see para 69).

(6) The court found that, the plaintiff-purchaser was the party which contravened the terms of the sale and purchase agreement by its failure to pay the balance purchase price within the agreed time and by its application to the State Government for changing the category of land use or zoning for the subject land into a burial ground (*tanah kubur*) although the sale and purchase agreement stipulated the subject land was sold on an 'as is where is' basis without any stipulation as to zoning. Despite the plaintiff's repeated failures to pay the balance purchase price, the vendor/intervener granted many extensions of time. When the plaintiff failed or refused to pay up the balance purchase price and late payment interest by 31 December 2011, the vendor was entitled to terminate the SPA subsequent thereto. The vendor's termination of the sale and purchase agreement was valid and lawful. These ground by itself warrant the dismissal of the plaintiff in the present case (see paras 73–74).

(7) In this case, the liquidator of the intervener by appointing a solicitor and by intervening to oppose the plaintiff's here herein, had in effect taken steps in the present action to resist the plaintiff's claims herein — steps akin to or having similar effect as a disclaimer of the contract for the sale and purchase of the subject-land. The opposition adopted by the liquidator of the intervener in was clear evidence that the liquidator of the intervener did not wish to continue with the sale and purchase transaction after having exhausted their patience with the plaintiff over nine extensions of time and after the plaintiff's prolonged delay of years in paying up the balance price and overdue interests. The plaintiff had not established any special circumstance for the court to grant an order of specific performance against the subject-land which was beneficially owned by the intervener-company in liquidation contrary to the wish of the liquidator. Not only that, the facts and circumstances of the present case were preponderantly against the court's exercise of discretion to grant the specific performance here. As an offshoot of the argument that the plaintiff's claim for specific performance was unsustainable in law, the plaintiff's claim for specific performance should also be dismissed on the ground that the plaintiff had not done its preceding obligation and/or was not, and is still not, ready and willing to perform its part of the contract of sale and purchase (see paras 85–87 & 89).

(8) The plaintiff-company was wound up for RM700,000 debt and there was no proof that the plaintiff, a wound up company, had the funds or

financial means to pay the balance price together with interests thereon. There was no proof that the official receiver had funds allocated for and was committed towards full payment of the balance purchase price and interest thereof if the court were to grant an order of specific performance in the present case. These facts also go to prove that even as at the date of trial, the plaintiff-purchaser was not ready and willing to perform its payment obligation. In light of the fact that the plaintiff-purchaser had not been ready and willing to perform its payment obligation, the vendor did not have to perform its part by causing its solicitors to release the title and transfer documents to the purchaser's solicitors. As the plaintiff-purchaser was not entitled to specific performance of the sale and purchase agreement, it followed that the plaintiff was also not entitled to any damages in lieu of specific performance (see paras 98–100).

(9) The sale and purchase agreement expressly provided that in the event of the vendor's termination of the agreement due to any breach or default on the part of the purchaser, the vendor was entitled to forfeit the deposit paid by the purchaser. As the plaintiff-purchaser was in breach of its payment obligation and that the vendor's termination of the sale and purchase agreement was lawful, the vendor was entitled to forfeit the deposit and had no obligation to refund the same to the plaintiff-purchaser. As the party in breach of the sale and purchase agreement, the plaintiff was not entitled to any refund of deposit (see paras 111–112).

(10) There was no proof that the extension letters and the terms thereof which were signed by officers of the intervener was signed as substitute or additional attorneys on behalf of the defendant. There was also no Board of Directors' resolution adduced to prove that the intervener had duly appointed the said officers to exercise the powers and functions under the power of attorney. In the premises the extension letters, though they may be binding upon the intervener, were not binding upon the defendant as they were not signed by duly appointed attorney or substitute or additional attorney (see para 118).

[Bahasa Malaysia summary

Tindakan semasa berbangkit daripada perjanjian jual beli berkaitan dengan tanah ('tanah tersebut'). Harga yang dipersetujui dalam perjanjian jual beli adalah RM4,827,600. Perjanjian jual beli tersebut ditandatangani oleh SAP Ulu Yam Sdn Bhd yang dikatakan bertindak sebagai peguam kepada pemilik tanah Yayasan Selangor sebagai penjual dan Summit Streams Sdn Bhd sebagai pembeli. Selepas memberikan sembilan lanjutan, Summit Streams Sdn Bhd gagal atau cuai untuk membayar baki harga 90%, dan akhirnya Yayasan Selangor menamatkan perjanjian jual beli tersebut. Kedua-dua SAP Ulu Yam Sdn Bhd dan Summit Streams Sdn Bhd (dalam likuidasi) telah digulung. Dalam tindakan semasa, Summit Streams Sdn Bhd (dalam likuidasi)

('plaintif') pada mulanya menyaman Yayasan Selangor ('defendan') untuk pelaksanaan spesifik perjanjian jual beli, atau sebagai gantinya dakwaan ganti rugi untuk penamatan dalam jumlah RM189,820,260 atau secara alternatif pembayaran balik deposit dan faedah yang didakwa dipersetujui semasa mediasi. Melalui kebenaran mahkamah, SAP Ulu Yam Sdn Bhd (In Likuidasi) ('pencelaj") dibenarkan menjadi pencelah. Dalam tindakan semasa, plaintif berpendapat bahawa masa untuk penyempurnaan adalah terbuka, dan bahawa defendan telah, menurut plaintif, secara salah menamatkan SPA. Plaintif juga berpendapat bahawa perlunya perintah pelaksanaan spesifik untuk jual beli atau sebagai alternatif deposit dan faedah yang dibayar di bawah perjanjian jual beli perlu dipulangkan kepada plaintif. Bagi pihak defendan, ianya telah dihujahkan bahawa: (a) plaintif tidak mempunyai lokus standi untuk memulakan tindakan semasa kerana ketiadaan sanksi yang sah oleh Jabatan Insolvensi Malaysia untuk plaintif; (b) kausa tindakan plaintif dalam tindakan ini telah dihalang oleh had masa dan/atau dihalang oleh laches; (c) SPA telah ditandatangani oleh pencelah sebagai pemilik benefisial dan bukan oleh wakil atau ejen yang diberi kuasa defendan; (d) masa di bawah SPA tidak ditetapkan secara terbuka dan oleh kerana plaintif gagal atau ingkat untuk membayar harga baki sebelum tarikh lanjutan untuk penyempurnaan, defendan telah menamatkan SPA secara sah; dan (e) plaintif tidak berhak mendapat remedi ekuiti bagi pelaksanaan spesifik dan ganti rugi. Isu-isu yang timbul untuk penentuan adalah: (i) sama ada plaintif mempunyai locus standi untuk memulakan saman sekarang; (ii) sama ada tindakan plaintif telah dihalang oleh tempoh had dan/atau oleh sekatan; (iii) sama ada penamatan perjanjian jual beli oleh defendan adalah sah; dan (iv) sama ada plaintif boleh menuntut bayaran balik deposit.

Diputuskan, menolak tuntutan plaintif:

(1) Dalam memulakan tindakan semasa ('tindakan 2018'), plaintif bergantung kepada sanksi yang dikeluarkan oleh Jabatan Insolvensi Malaysia ('MDI') bagi tujuan memfailkan dan mengekalkan tindakan terhadap Yayasan Selangor dan SAP Ulu Yam Sdn Bhd selepas mendapat sanksi MDI, plaintif memulakan tindakan di Mahkamah Tinggi ('tindakan 2017'). Dalam hal tersebut, sanksi MDI adalah khusus untuk saman 2017 dan sebenarnya telah digunakan dan dilaksanakan untuk saman 2017. Apabila plaintif memfailkan saman semasa pada September 2018 terhadap Yayasan Selangor sebagai defendan tunggal, tiada sanksi bertulis diberikan MDI untuk memulakan tindakan. Sanksi untuk seseorang bankrap atau syarikat yang digulung untuk memulakan tindakan mahkamah mestilah khusus dan tidak dimaksudkan untuk prosiding berganda. Oleh kerana tiada sanksi bertulis khusus daripada MDI untuk memulakan tindakan semasa, tindakan semasa yang difailkan oleh plaintif adalah terbatal dan tidak sah ab initio. Oleh itu,

saman plaintif sekarang hendaklah ditolak dan/atau dibatalkan (lihat perenggan 34–36, 39 & 41–42).

(2) Dalam tindakan semasa, lanjutan masa terakhir (lanjutan masa ke-9) yang diberikan kepada plaintif telah tamat pada 31 Disember 2011 dan apabila plaintif masih gagal atau cuai untuk membayar harga baki, plaintif telah dimaklumkan melalui surat bertarikh 26 Mac 2013 bahawa perjanjian jual beli akan ditamatkan melainkan harga baki telah dibayar sebelum 31 Mac 2013. Tidak kira sama ada kausa tindakan dalam pelaksanaan spesifik terakru pada atau sejurus selepas 31 Disember 2011 (tarikh tamat tempoh terakhir lanjutan masa) atau pada 31 Mac 2013 (tempoh pengecualian akhir), kausa tindakan plaintif masih dihalang oleh Akta Had Masa berbanding Pencelah. Mahkamah ekuiti tidak dapat memberikan remedi ekuiti terhadap defendan nominal (iaitu Yayasan Selangor) untuk memaksa pelaksanaan spesifik kontrak yang memberikan kesan kepada defendan sebenar dan substantif (SAP Ulu Yam Sdn Bhd) daripada pemilikan benefisialnya terhadap tanah subjek dalam keadaan di mana kausa tindakan plaintif telah dihalang oleh tempoh had masa berbanding defendan sebenar dan substantif. Ia adalah tidak adil atau saksama untuk plaintif dibenarkan untuk melangkau tempoh had masa berbanding defendan sebenar dan substantif dengan secara tidak langsung menyaman defendan nominal dan memintas defendan sebenar dan substantif. Dalam keadaan tersebut, kausa tindakan plaintif terakru pada pertengahan tahun 2011 dan oleh itu tindakan yang difailkan pada September 2018 telah dihalang oleh Akta Had Masa 1953, yang difailkan selepas enam tahun dari pertengahan tahun 2011 (lihat perenggan 49–51)

(3) Pihak yang memohon remedi ekuiti pelaksanaan spesifik harus meneruskan perkara tersebut dengan tekun dan telus. Dalam keadaan kes semasa, kelewatan bertahun-tahun untuk menyempurnakan urus niaga jual beli adalah disebabkan oleh keengganan plaintif yang berulang kali dan berpanjangan untuk membayar harga baki sehingga dan melainkan plaintif boleh mendapatkan kelulusan perancangannya untuk pasca unilateral kontrak syarat-syarat luar untuk membangunkan tanah subjek menjadi tanah perkuburan untuk memenuhi tujuan komersialnya sendiri. Pengenaan unilateral plaintif untuk mendapatkan kelulusan perancangan untuk tanah perkuburan adalah tidak munasabah dan bukan sebahagian daripada terma perjanjian jual beli. Plaintif telah bertegas enggan atau gagal membayar harga baki walaupun telah berlalu kira-kira sembilan tahun. Dalam keadaan tersebut, plaintif telah bersalah atas laches dan oleh itu tidak berhak mendapat sebarang bantuan oleh mahkamah ekuiti. Oleh itu, tindakan plaintif untuk pelaksanaan spesifik harus ditolak (lihat perenggan 52, 57 & 59–60).

(4) Di bawah terma perjanjian jual beli, plaintif perlu membayar harga baki

dalam masa yang dipersetujui secara kontrak dan kemudian mengambil tanah subjek 'seadanya' tanpa mengira apa-apa rancangan pembangunan masa depan atau tema pembangunannya dan tanpa mengira apa-apa pengezonan yang mungkin ada oleh pihak berkuasa kerajaan untuk tanah subjek. Mengenai fakta kes, plaintif tidak membuat pengakuan terhadap kes kekecewaan kontrak disebabkan oleh pertukaran terma asas seperti perubahan kategori penggunaan tanah oleh pihak berkuasa Kerajaan yang bertentangan dengan pertimbangan pihak berkontrak pada masa pembuatan kontrak tersebut. Oleh yang demikian, tiada sebarang asas pun untuk mahkamah ini mempertimbangkan sama ada deposit dan faedah yang dibayar perlu dipulangkan atau tidak atas alasan kekecewaan kontrak (lihat perenggan 66).

(5) Tiada kelewatan yang boleh dipersalahkan di pihak penjual berkenaan dengan penyempurnaan transaksi jual beli. Penjual pada setiap masa material sebelum penamatan kontrak bersedia dan sanggup untuk melakukan bahagiannya dalam menyempurnakan transaksi jual beli sekiranya plaintif membayar harga baki dan faedah tertunggak. Dalam keadaan tersebut, mahkamah menolak penghujahan plaintif bahawa masa untuk menyempurnakan urus niaga jual beli telah ditetapkan secara terbuka (lihat perenggan 69).

(6) Mahkamah mendapati bahawa, plaintif-pembeli adalah pihak yang melanggar terma perjanjian jual beli dengan kegagalan membayar harga baki belian dalam masa yang dipersetujui dan dengan permohonannya kepada Kerajaan Negeri untuk menukar kategori penggunaan tanah atau pengezonan untuk tanah subjek menjadi tanah perkuburan (tanah kubur) walaupun perjanjian jual beli menetapkan tanah subjek dijual atas dasar 'seadanya di mana ada' tanpa sebarang ketetapan mengenai pengezonan. Walaupun kegagalan berulang kali plaintif membayar harga belian baki, penjual/pencelah memberikan banyak lanjutan masa. Apabila plaintif gagal atau enggan membayar harga baki belian dan faedah pembayaran lewat sebelum 31 Disember 2011, vendor berhak untuk menamatkan SPA selepas itu. Penamatan perjanjian jual beli oleh vendor adalah sah di sisi undang-undang. Alasan ini dengan sendirinya menjamin penolakan plaintif dalam kes ini (lihat perenggan 73–74).

(7) Dalam kes ini, pelikuidasi pencelah dengan melantik peguam cara dan dengan mencelah untuk menentang plaintif di sini, telah mengambil langkah dalam tindakan sekarang untuk menentang tuntutan plaintif di sini — langkah yang serupa atau mempunyai kesan yang serupa sebagai penafian kontrak untuk penjualan dan pembelian tanah subjek. Penentangan yang diguna pakai oleh pelikuidasi pencelah adalah bukti jelas bahawa pelikuidasi pencelah tidak mahu meneruskan urus niaga jual beli selepas mengguna pakai budi bicara dengan plaintif selama sembilan lanjutan masa dan selepas penangguhan plaintif yang

berpanjangan selama bertahun dalam membayar harga baki dan faedah tertunggak. Plaintif tidak menetapkan sebarang keadaan khas untuk mahkamah memberikan perintah pelaksanaan spesifik terhadap subjek-tanah yang dimiliki secara benefisial oleh syarikat pencelah dalam likuidasi bertentangan dengan kehendak pelikuidasi. Bukan itu sahaja, fakta dan keadaan kes semasa adalah sebahagian besarnya bertentangan dengan budi bicara mahkamah untuk memberikan pelaksanaan spesifik di sini. Sebagai cabang daripada hujah bahawa tuntutan plaintif untuk pelaksanaan spesifik adalah tidak dapat dipertahankan di sisi undang-undang, tuntutan plaintif untuk pelaksanaan spesifik juga harus ditolak atas alasan bahawa plaintif tidak melakukan obligasi sebelumnya dan/atau tidak, dan masih tidak, bersedia dan sanggup untuk melaksanakan bahagiannya dalam kontrak jual beli (lihat perenggan 85–87 & 89).

(8) Syarikat plaintif telah digulung atas hutang RM700,000 dan tidak ada bukti bahawa plaintif, sebuah syarikat yang digulung, mempunyai dana atau sumber kewangan untuk membayar harga baki berserta faedah ke atasnya. Tiada bukti bahawa pegawai penerima mempunyai dana yang diperuntukkan dan komited terhadap pembayaran penuh baki harga belian dan faedahnya jika mahkamah memberikan perintah pelaksanaan spesifik dalam kes semasa. Fakta ini juga membuktikan bahawa walaupun pada tarikh perbicaraan, plaintif-pembeli tidak bersedia dan sanggup untuk melaksanakan kewajipan pembayarannya. Memandangkan fakta bahawa plaintif-pembeli belum bersedia dan sanggup untuk melaksanakan kewajipan pembayarannya, penjual tidak perlu melaksanakan bahagiannya dengan mengarahkan peguamcaranya mengeluarkan hak milik dan memindahkan dokumen kepada peguamcara pembeli. Oleh kerana plaintif-pembeli tidak berhak kepada pelaksanaan spesifik perjanjian jual beli, ia menunjukkan bahawa plaintif juga tidak berhak untuk sebarang ganti rugi sebagai ganti pelaksanaan spesifik (lihat perenggan 98–100).

(9) Perjanjian jual beli dengan jelas memperuntukkan bahawa sekiranya penamatan perjanjian oleh penjual disebabkan oleh sebarang pelanggaran atau keingkaran di pihak pembeli, penjual berhak untuk melucutkanhak deposit yang dibayar oleh pembeli. Oleh kerana pembeli plaintif telah melanggar kewajipan pembayarannya dan penamatan perjanjian jual beli oleh penjual adalah sah di sisi undang-undang, penjual berhak untuk melucutkanhak deposit dan tidak mempunyai kewajipan untuk membayar balik kepada pembeli plaintif. Sebagai pihak yang melanggar perjanjian jual beli, plaintif tidak berhak mendapat sebarang bayaran balik deposit (lihat perenggan 111–112).

(10) Tiada bukti bahawa surat lanjutan dan syarat-syaratnya yang ditandatangani oleh pegawai pencelah telah ditandatangani sebagai

peguam ganti atau tambahan bagi pihak defendan. Tiada juga resolusi Lembaga Pengarah yang dikemukakan untuk membuktikan bahawa pencelah telah melantik pegawai tersebut dengan sewajarnya untuk menjalankan kuasa dan fungsi di bawah surat wakil kuasa. Di dalam premis surat lanjutan, walaupun ia mungkin mengikat pencelah, tidak mengikat defendan kerana ia tidak ditandatangani oleh peguam yang dilantik atau peguam pengganti atau peguam tambahan (lihat perenggan 118).]

Cases referred to

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Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619; [2014] 2 CLJ 773, CA (refd)

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Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd [2020] 5 MLJ 614; [2020] 9 CLJ 449, FC (refd)

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Shirley Koh Gek Ngo & Anor v Tanah Emas Bio-Tech (M) Sdn Bhd (formerly known as Gagnar Bio-Tech (M) Sdn Bhd) [2014] 6 MLJ 77; [2014] 1 LNS 687, CA (refd)

Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd [1988] 2 MLJ 672; [1987] 1 LNS 79 (refd)

Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1; [2014] 2 CLJ 1, FC (refd)

Legislation referred to

Companies Act 2016
Contracts Act 1950 s 53
Limitation Act 1953

Liang Chong Beng (with Shalini) (Nga Hock Cheh & Co) for the plaintiff.
Fahda Nur bt Ahmad Kamar (with Ariffin bin Haron and Amanina Yusrina bt Ahmad Kamal) (Fahda Nur & Yusmadi) for the defendant.
Kuek Ing Huey (TS Chin) for the intervener.

Tee Geok Hock JC:

INTRODUCTION

[1] This suit arose from a sale and purchase agreement relating to land known as HS (D) 4104 PT No 2731, Mukim Ulu Yam, Daerah Hulu Selangor ('the said land'). The said land, covered by forest trees, is located at the rather steep hill slopes of Ulu Yam District, Selangor. The agreed price in the sale and purchase agreement was RM4,827,600.

[2] The sale and purchase agreement was signed by SAP Ulu Yam Sdn Bhd who purported to act as the attorney for the landowner Yayasan Selangor as the vendor and Summit Streams Sdn Bhd as the purchaser.

[3] The original period under the sale and purchase agreement for payment of the balance 90% purchase price was RM4,827,600. After having granted many times of extensions, the purchaser still failed or neglected to pay the balance 90% price, and eventually the vendor terminated the sale and purchase agreement.

[4] Both SAP Ulu Yam Sdn Bhd and Summit Streams Sdn Bhd have since been under wound up.

[5] In this suit, Summit Streams Sdn Bhd (in liquidation) ('the plaintiff') has initially sued Yayasan Selangor ('the defendant') for specific performance of the sale and purchase agreement, or in lieu thereof alleged damages for termination in the amount of RM189,820,260 or alternatively refund of deposit and interests allegedly agreed during a mediation. By leave of court, SAP Ulu Yam Sdn Bhd (in liquidation) ('the intervener') was allowed to be an intervener in this Suit.

[6] After a full trial and closing submissions, this court on 21 October dismissed the plaintiff's claims with costs.

[7] Being dissatisfied with the decision, the plaintiff has filed a notice of appeal against the entirety of the said decision.

THE TRIAL

[8] The trial, which was held sporadically between 5 October 2020 till 6 August 2021 and lasted for seven days altogether:

No	Date	Proceedings
1.	5 October 2020	Tan Mei Ying (PW1) – Examination-in-chief – Cross-examination – Re-examination
2.	7 October 2020	Hearing on point of law, whether evidence of negotiation in mediation proceedings in Suit 2014 is admissible. COURT RULING: 'Therefore, I rule that AB-112 and any evidence regarding the mediation are not admissible as evidence in this case'
3.	2 March 2021	Tuan Shahrul Rizal (PW2): – Examination-in-chief – Cross-examination – Re-examination Leong Peng Woon (PW3): – Examination-in-chief – Cross-examination
4.	3 March 2021	Leong Peng Woon (PW3): – Continuation of cross-examination – Re-examination Puan Mahizun (DW1): – Examination-in-chief – Cross-examination – Re-examination
5.	4 March 2021	Puan Nini (DW2): – Examination-in-chief – Cross-examination
6.	5 April 2021	Encik Mohd Ali Ithnin (DW3) – Examination-in-chief – Cross-examination

		– Re-examination
7.	6 August 2021	Puan Nini Shazrina (DW2) – Continuation of cross-examination – Re-examination – Continuation of trial via zoom

[9] Both plaintiff and defendant brought three witnesses each:

(a) plaintiff's witnesses:

(i) PW1: Tan Mei Yeng;

(ii) PW2: Shahrul Rizal bin Majid; and

(iii) PW3: Leong Peng Woon @ Md Salim bin Abdullah.

(b) defendant's witnesses:

(i) DW1: Mahizun bt Saidin;

(ii) DW2: Nini Shazrina bt Ahmad Shamli; and

(iii) DW3: Mohd Ali bin Ithnin.

[10] At the start of the trial, it was mutually agreed by the parties that with regard to the bundles of documents referred to in the present suit, the parties have agreed, with leave of this court, that the documents can be referred to as AA (for Part A documents) or AB (for Part B documents) followed by the relevant page numbers in accordance with their respective reference numbers without the necessity to mark them separately with different exhibit numbers again. There is no Part C documents (wherein the authenticity is disputed) in the present case. Before the start of the trial it was also directed with the parties' consent that the witness statement of a witness is taken as read without having to read into the CRT system again when the witness has taken the witness stand to swear upon oath that the contents of the witness statement forms his/her evidence in this case and signs the witness statement in the sight of the court. Although parties' respective counsel cross-examined the witnesses at length on the contents of the Part B documents, this court finds that the issues on locus standi and limitation period are primarily questions of law with little or no facts in dispute, while most of the other main issues can be dealt with and considered in light of the contemporaneous documents which should carry relatively more evidential weight than a witness' oral evidence. Hence, this court in this judgment will not set forth *in extenso* the oral evidence of witnesses which do not tally with the contents of the contemporaneous documentary evidence or which attempts to explain away the clear contents in the contemporaneous documents tendered in evidence here.

A **[11]** It is pertinent to point out that by order of court dated October 2020, plaintiff's copy of the mediation notes at AB 112 shall be inadmissible and that all matters relating to the mediation proceedings shall be excluded. None of the parties has disputed or challenged the said order of this court.

B **[12]** After the full trial, the parties were given time and extended times for filing and exchange written submissions and submissions in reply, and they did exchange and file the closing submissions.

C MATERIAL FACTS

[13] By way of a joint venture agreement dated 3 November 1993 ('JVA'), the defendant had appointed the intervener to be responsible for the development of the said land (see AB 174–217, and AB 218–228). Thereafter, D the defendant signed a power of attorney No 4117/93 ('POA 4117/93') to give the intervener specific power to enter into agreements for purposes of developing the said land (see AB 41–47). The execution and contents of these two documents are not in dispute in the present suit.

E **[14]** The sale and purchase agreement dated 31 July 2009 ('the SPA') was signed by the intervener as the attorney for the defendant (see AB 21–40). The execution and contents of the sale and purchase agreement are not in dispute in the present suit The SPA was originally named between the plaintiff and the intervener. However, at the plaintiff's request the intervener's name was F amended and replaced with the defendant's name (AB 60–62; AB 65–67). The signing of the sale and purchase agreement by a Director and another Director/Secretary of the intervener with the intervener's company affixed thereunto was expressed to be in the capacity as the attorney of the defendant pursuant to the power of attorney No 4117/93 dated 3 November 1993: see G AB 40.

[15] Pursuant to the SPA, the plaintiff is obliged to settle the total purchase price within three months from the date upon when the plaintiff receives the H certified true copy of the consent to transfer the said land. Consent to transfer the said land was obtained from Pejabat Daerah/Tanah Hulu Selangor vide letter dated 9 September 2009 (see AB231), and therefore the plaintiff would have to settle the total purchase price on/before 28 December 2009 (see AB 69–70 and AB71).

I **[16]** Despite the agreement pursuant to the SPA, the plaintiff had failed, neglected and/or omitted to settle the total purchase price within the stipulated time and thereupon the plaintiff applied and was granted for extensions of time as follows:

Extension of Time No	Date of Extension	Reference to Document
1.	28 December 2009 to 28 January 2010	AB 21–40, AB235 (30 days extension)
2.	29 January 2010 to 28 February 2010	AB 77
3.	1 March 2010 to 31 May 2010	AB 80
4.	1 June 2010 to 31 October 2010	AB 83
5.	1 November 2010 to 28 February 2011	AB 88, and AB 242–243
6.	1 March 2011 to 31 March 2011	AB 247
7.	1 April 2011 to 31 July 2011	AB 259
8.	1 August 2011 to 30 September 2011	AB 265
9.	1 October 2011 to 31 December 2011	AB 274

The plaintiff's witness PW3 was cross-examined at length on the various letters on extensions of time and the defendant's witness including DW1 Mahizun also testified on the grant of nine extensions of time (see WS-DW1 Q&A 34–45).

It is to be noted that the extensions of time were granted by letters signed by an officer of the intervener but in the said letters, there is no notation to state that the signatory of each of the letters was acting as 'Attorney' for the defendant. There is also no document produced by any party in the present suit to show whether or not the signatory of each extension letter was appointed as substitute or additional attorney of the defendant. As the defendant has disputed some of the letters and documents signed by the intervener's officers as having been allegedly authorized by the defendant, the word 'Vendor' will be used in this judgment to describe the vendor under the sale and purchase agreement which was signed by two Directors of the intervener under common seal and expressed in the capacity as the attorney for the defendant, while the word 'intervener' will be used to describe the signatory to a document or letter under the letterhead of the intervener and signed by an officer of the intervener without expressly stating any capacity as the attorney for the defendant.

[17] On its own accord, the plaintiff applied for a conversion of status on the said land from building ('bangunan') to burial ground ('tanah perkuburan') (see AB 5–8 and AB 48–50). This was testified by the defendant's witnesses (including PW1 Mahizun in WS-DW1 Q&A 19 and not denied by the plaintiff's witnesses. This new proposal of the plaintiff to use the subject-land for burial ground was not part of the sale and purchase agreement and was never raised with the vendor until the plaintiff on its own applied for conversion of status on the said land from building ('bangunan') to burial

ground ('tanah perkuburan') (see p 32 of cross-examination of PW3 Leong (encl 139 p 126)). However, the plaintiff's application was rejected by Jabatan Perancangan Bandar dan Desa as the said conversion is contrary to the 'Draf Rancangan Tempatan Hulu Selangor 2020 (see AB 232–234). It is pertinent to note that when the land was first bought by plaintiff, the plaintiff never once was mentioned about the plan to convert it to a burial ground to the vendor. It was only made known to the intervener by their letter dated 28 December 2009 when they requested extension of time (AB 232–234; WS-DW1 Q&A 25; p 32 of cross-examination of PW3 (encl 139 p 136)0.

[18] By letter dated 03 December 2009 Jabatan Perancangan Bandar dan Desa had informed Majlis Daerah Hulu Selangor that the zoning of the said land has been *gazetted* to be 'Kawasan Semulajadi/Hutan Simpan' (PW1 Mahizun's evidence in WS-PW1 Q&A 23).

[19] The plaintiff filed their appeal against the decision on the conversion of status on the said land which was scheduled to be heard and decided on 17 February 2011. However, the said appeal was postponed.

[20] By letter dated 8 March 2011 Jabatan Perancangan Bandar dan Desa had dismissed the plaintiff's appeal as there was already a total of 34 burial grounds in the state of Selangor and therefore, the zoning of the said land was to remain as 'Zon Hutan'. The decision was also based on the physical terrain of the said land whereby the gradient of the said land had been classified as Class 3 and Class 4, which is not suitable for the purposes of burial grounds (AB 300 and AB 301). This was also testified by both parties' witnesses.

[21] Thereafter, vide letter dated 12 January 2011 the intervener had offered to terminate the SPA and this was first accepted by the plaintiff vide letter dated 17 January 2011 (see AB 242–243, AB 244; PW1 Mahizun's evidence in WS-PW1 Q&A 22).

[22] By letter dated 16 February 2011 the intervener wrote to the plaintiff inform them that a police report has been lodged to state that another company, ie 'Sunmit Streams Sdn Bhd' has claimed to have entered into an SPA with the intervener (exhs D5, D6, D7, D8 and D9; AB 90; D5 at *Ikatan Dokumen Bersama Tambahan* (B) ('IDBT'), at pp 5 and 8). Tan Mei Yeng, the person who signed the sale and purchase agreement dated 31 July 2009 with the vendor in respect of the subject land, was a Director of Sunmit Streams Sdn Bhd as from 3 August 2009 (see SSM serach report in exh D10) and also a Director of Summit Streams Sdn Bhd as from 3 August 2009 (see SSM serach report in exh P4). However, instead of explaining the situation, the plaintiff reacted by way of letter dated 17 February 2011 to unilaterally revoke the said acceptance to terminate the SPA (AB 91–92, and AB 98–99) and by letter

dated 16 March 2011, plaintiff threatened the intervener not to terminate the SPA and instead and demand from the intervener exorbitant damages in the sum of RM100m! (AB 98). When the intervener was about to return the deposit, Messrs Fernando & Co and Messrs Yeo Tan Othman both wrote to the intervener insisting that the deposit is to be returned to Sunmit Streams Sdn Bhd (D5, at IDBT, pp 1–2; D9, at IDBT, pp 7–8). PW3 Leong was also cross-examined on the topic regard Sunmit Stream Sdn Bhd's claims.

[23] In the same letter, dated 17 February 2011 (AB 91–92), the plaintiff requested for another extension of time to settle the balance purchase price for a further three months (with extension of one month) from the date of their appeal against the conversion decision. However, the intervener, by way of letters dated 8 March 2011 and 15 March 2011 had counter proposed that time shall only be extended until 31 March 2011 — but this was still unacceptable to the plaintiff (AB 94–96; AB 97).

[24] On 12 August 2011, the plaintiff had further discussed with the intervener for a possible extension of time, subject to the plaintiff paying late interests on the balance purchase price, wherein the plaintiff requested for an extension of time until 31 December 2011 (AB 265–267, AB 268).

[25] By letter dated 4 October 2011 the intervener informed the plaintiff that they will only consider any extension of time only if the plaintiff settles late payment interest amounting to RM230,455.08 as at 30 September 2011. Should the plaintiff fail, neglect and/or omit to settle the said late payment interest, the SPA shall be terminated forthwith (AB 269–270).

[26] The plaintiff responded by letter dated 11 November 2011 with a rather intimidating statement stating that if the intervener does not allow for extension of time requested, the plaintiff will proceed to file a summons against the intervener for an alleged damages in the exorbitant sum of RM214,500,000 (AB 271–273).

[27] By letter dated 1 December 2011 the intervener allowed for an extension of time until 31 December 2011 for the plaintiff to settle the balance purchase price as per the SPA, failing which the SPA shall be terminated (AB 274). However, the plaintiff responded with a letter dated 6 December 2011 unilaterally alleging that time is at large (AB 275–276). This allegation of time at large was denied by the defendant and the intervener.

[28] By letter dated 26 March 2013 the intervener's solicitors (then) had corresponded with the plaintiff's solicitors stating that as matter had been prolonged up until the date of the letter — the SPA shall be terminated should the plaintiff fail, neglect and/or omit to settle the balance purchase price

on/before 31 March 2013 (AB 278, and AB 111).

[29] *After almost four years and nine extension of time*, the plaintiff had still failed, neglected and/or omitted to settle the balance purchase price, and thus the defendant and the intervener took the position that the SPA was terminated on 31 March 2013.

[30] The plaintiff then proceeded to file a suit through Civil Suit No 22NCVC-544–11 of 014 ('2014 Suit') and Civil Suit No BA-22NCVC-329–05 of 2017 ('2017 Suit') against the defendant and the intervener but both were withdrawn by the plaintiff, as the plaintiff was wound up. Therefore, including this suit before this court ('2018 Suit'), there have been three suits to-date on the same matter.

PARTIES' ARGUMENTS

[31] In the present suit, the plaintiff argues that the time for completion is at large and that the defendant has, according to the plaintiff, wrongfully terminated the SPA. The plaintiff also argues that there should be an order of specific performance of the sale and purchase or alternatively the deposit and interest paid under the sale and purchase agreement should be refunded to the plaintiff.

[32] On behalf of the defendant, it is argued that: (a) the plaintiff has no locus standi to commence the present suit because of the absence of a valid sanction by the Malaysian Department of Insolvency for the plaintiff, a company which had been wound up, to commence and maintain the present suit; (b) the plaintiff's cause of action in the present suit is barred by limitation period and/or barred by laches; (c) the SPA was signed by the intervener as the beneficial owners and not by the defendant's authorised representative or agent; (d) time under the SPA was not set at large and as the plaintiff failed or neglected to pay the balance price by the extended date for completion, the defendant validly terminated the SPA; (e) in any event, the plaintiff is not entitled to the equitable remedy of specific performance; and (f) the plaintiff is not entitled to damages.

Issue 1: Whether the plaintiff has locus standi

[33] According to the SSM search dated 3 July 2017 the plaintiff has been wound up on 31 July 2015 (refer AA 9–14). As at the date of trial it was not disputed that the plaintiff-company was still wound up (see p 6 of cross-examination of PW3 Leong (encl 139 p 32)).

[34] In initiating this action ('Suit 2018'), plaintiff relied on the sanction

issued by the Malaysian Department of Insolvency ('MDI') vide letter dated 16 March 2017 (encl 97, pp 1–3 and 4–5). This was confirmed by PW3 Leong in his evidence. PW2 Shahrul Rizal bin Majid, the relevant officer in Jabatan Insolvensi at the material time, testified that subsequent to 16 March 2017 until the date of trial there was no communication between Jabagtan Insolvensi and the plaintif and that Jabatan Insolvensi has not been aware of the filing of this 2018 Suit (see pp 2–3 of cross-examination of PW2 (encl 139 pp 66–67)]. In his cross-examination, PW3 Leong also confirmed that the MDI's letter dated 16 March 2017 refers to the 2017 Suit and not his 2018 Suit (see p 128 of cross-examination of PW3 Leong (encl 139 p 222)). Although PW2 in his witness statement seemed to suggest that the letter dated 16 March 2017 could be used for two court suits and that it could refer to this Suit 2018 also, this court holds that as a question of law, a sanction letter can only be used for only one court suit and not multiple of times for more than one court suit.

[35] This court finds that the MDI's sanction dated 16 March 2017 was obtained for the purposes of filing and maintaining a suit against two defendants, namely Yayasan Selangor and SAP Ulu Yam Sdn Bhd. Subsequent to obtaining this MDI's sanction dated 16 March 2017, the plaintiff commenced Shah Alam High Court Suit No BA-22NCVC-329–05 of 2017 ('2017 Suit') in May 2017. In the circumstances, the MDI's sanction dated 16 March 2017 was specifically for the 2017 Suit and has in fact been utilised and spent for the 2017 Suit.

[36] When the plaintiff filed the present suit in September 2018 against Yayasan Selangor as the sole defendant, there was no prior written sanction of the Malaysian Department of Insolvency for the commencing of the present suit. Until the date of trial, there was still no written sanction from MDI specifically for the plaintiff's commencement of the present suit. This is also testified by PW2 at the trial: see notes of evidence in encl 139 pp 66–67. PW2 also confirmed that the MDI's sanction dated 16 March 2017 was not expressed to be allowed to be used multiple times: see notes of evidence in encl 139 pp 69.

[37] In *Nestra Plantations Sdn Bhd v Fadzillah bt Abd Rahman & Ors* [2016] 5 MLJ 484; [2016] 8 CLJ 453 our Court of Appeal held that a sanction obtained from MDI is specific in the sense that it could not operate in any other instances, other than what the sanction was obtained for.

[38] In *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614; [2020] 9 CLJ 449, the Federal Court in the judgment delivered by Vernon Ong FCJ held, inter alia, as follows:

Principles Underlying The Requirement For Sanction

A [17] In the case of an undischarged bankrupt, the sanction of the Director General of Insolvency (DGI) is required in order for the bankrupt to maintain any action or proceeding (other than an action for damages in personal injury claims) — s 38(1)(a) of the Insolvency Act 1967. This rule restricting the conduct of an undischarged bankrupt is meant for the protection of his creditor's interest and B those dealing with him so as to maintain the commercial morality of his dealings. The underlying rationale for a bankrupt's disabilities and disqualifications was expressed in the following manner in *Khoo's Law and Practice of Bankruptcy in Malaysia* (2nd Ed) at p 1:

> When a person becomes a bankrupt, he obtains protection from legal C proceedings by his creditors subject to certain exceptions.
>
> However, he is subject to certain disabilities and disqualifications primarily aimed at preventing him from incurring further debts ...
>
> The objective of the bankruptcy process is that, since the debtor is unable to D satisfy all his debts, his assets should be shared fairly and equitably among his creditors ...

[18] In *Tan Wee Hun v Inchape Equatron (M) Sdn Bhd* [1998] 5 CLJ 769, the court observed that:

> E The object of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligations.

[19] More importantly, the underlying principle for the requirement of a sanction is that if a bankrupt is allowed to continue with an action, he would not be able to F pay costs should his action be dismissed. This would leave the defendant in a disadvantaged position; in that the defendant being compelled to defend the claim will be unable to recover costs if the bankrupt's claim is dismissed.

[20] Similarly, if a company is wound up by an order of court, the board of directors becomes functus officio. The management of the company is vested in the G liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company. A creditor or contributory cannot commence or continue with any action in the name of the wound up company. Accordingly, if a creditor or contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory H must apply to the liquidator for his sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound up company's action is dismissed, the liquidators usually impose conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given.

I ...

[25] The general rule is that once a company has been wound up by an order of the court, the locus standi to bring or proceed with an action or proceedings is vested in the liquidator. This principle has been enunciated in a line of Federal Court and the Court of Appeal decisions ...

[39] Consistent with the principles underlying the requirement of sanction and in furtherance of the objective of the requirement of sanction, it can be concluded that a sanction for a bankrupt or a wound up company to commence a court suit must be specific and is not meant for multiple proceedings. If a bankrupt or a wound up company were to use a sanction for multiple times to commence multiple court suits, it would defeat or stultify the statutory objectives of preservation of the insolvent entity's assets by avoiding the incurring of further debts and of protecting a solvent defendant from inability to recover legal costs in the event of the dismissal of the insolvent entity's multiple court suits.

[40] In *Lereno Sdn Bhd & Ors v Malaysian Debt Ventures Berhad & Ors* [2017] 1 LNS 2232, Nor Bee Ariffin J (now JCA) held in the High Court that:

> [65] *It is trite that any action filed prior to the grant of the sanction is invalid and void ab-initio*. The decision of the Court of Appeal in *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle and Carriage Bhd* [2013] 1 MLJ 406; [2012] 10 CLJ 88 at pp 92–95 in this regard is instructive:
>
> > [11] It is a fundamental principle of law that once a limited company is wound up, its assets and liabilities vests in the liquidator appointed. It is up to him to decide whether to institute, continue the prosecution of, or defend legal proceedings.
> >
> > [14] At the time of filing the present action all the property as well as things in action to which the appellant company was or appeared to be entitled, were vested in the liquidator (the official assignee). It was only the official assignee who can bring or defend any action or other legal proceedings which relates to that property of which it was necessary to bring or defend for the purpose of effectually winding up the company and recovering its property. In other words, *only the official assignee has the necessary locus standi to commence the action on behalf of the appellant company against the respondent. The appellant company itself or its shareholders or its directors have no locus standi to do so without the leave of the official assignee or the court. An action filed by the appellant without any leave from the official assignee (as liquidator) or the court or filed by the appellant without having any locus standi to do so in law is clearly illegal and invalid. The said action ought to be struck out*.
> >
> > [16] *There is no evidence to show that the commencement of the present action by the appellant itself on 26 February 2009 was done with the knowledge and authority of the official assignee as the liquidator*. Clearly, the appellant or its shareholders or creditors cannot usurp the powers of the liquidator in initiating the present action and then later, after objections raised by the respondent, apply for leave or sanction from the official assignee. The authority given by the official assignee is dated 3 March 2011, more than two years and three months after action was in court. There are no provisions of law to authorise that leave or sanction of the OA is to have retrospective effect. The appellant lacked locus standi right from

A the time when the action was filed. Therefore the action was invalid and void ab initio.

[18] ... We are of the view that the action by the appellant against the respondent should be struck out on the ground of failure on the part of the appellant to obtain prior leave or sanction either from the official assignee as liquidator or the B court under s 233(2) of the Companies Act 1965.

[66] The issue before the Federal Court in *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1; [2014] 2 CLJ 1 was whether the sanction by the official receiver dated 19 August have a retrospective effect, hence validating the application C for leave which was filed prior to the issuance of the sanction. The Federal Court approved the decision in *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle and Carriage Bhd* and said these:

[19] As such, we find no reason to depart from the decision of the Court of Appeal in *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang* D *Bhd* [2012] 10 CLJ 88, which this court refused leave to appeal on 19 September 2013. To recapitulate, in the above case, inter alia, it was held that:

(i) The sanction granted under Section 236(2)(a) of the Companies Act 1965 to bring, defend any action or other legal proceedings in the name or on behalf of the company *does not have a retrospective effect* ... E

[41] As there was no specific written sanction from the Malaysian Department of Insolvency for the commencement of the present suit filed in September 2018 and any subsequent sanction (even if any has been obtained F subsequent to the date of filing the present) cannot have retrospective effect according to the Federal Court's decisions in *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614; [2020] 9 CLJ 449 and *Winstech Engineering Sdn Bhd v Espl (M) Sdn* G *Bhd* [2014] 3 MLJ 1; [2014] 2 CLJ 1 the present suit filed by the plaintiff-company (winding up) in September 2018 was null and void ab initio.

[42] On this ground itself, the plaintiff's present action should be dismissed H and/or struck out.

Issue 2: Whether the plaintiff's action is barred by limitation perod and/or by laches

[43] In our present case, the plaintiff's main prayer is for the equitable I remedy of specific performance. It is trite law that the limitation period of six years for a suit for specific performance starts from the date of accrual of the cause of action for specific performance.

[44] In *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd &*

Anor [2021] 4 MLJ 367; [2020] 1 LNS 2104; [2021] 2 MLRA 378 the Court of Appeal held, inter alia, that:

> [176] The principle in this regard was stated in the speech by Lord Pearce in *Cartledge (Widow and Adminitratix of the Estate of Fred Hector Cartledge (deceased) and Others v E Jopling & Sons, Ltd* [1963] 1 All ER 341 (HL), where he said (p352) '*when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period*'. And in this context, we do not think that it matters *whether the plaintiff's claim is based on a contractual debt or a claim based on unjust enrichment as the period of limitation is six years for both.*

[45] The term 'cause of action' has been judicially defined in appellate court's decisions, including:

(a) *Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd* [2020] 3 MLJ 342; [2020] 2 CLJ 833 (COA judgment delivered by Hasnah JCA (now FCJ)):

> [22] David Wong Dak Wah, J (as he then was) in *Hiap-Tain Welding v Bousted Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)* cited the case of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63; [1988] 1 CLJ 219, *where Tun Salleh Abbas explained what is meant by 'cause of action': 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action*. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act'.

(b) *Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd and another appeal* [2021] 3 MLJ 408; [2021] 3 CLJ 34 (judgment delivered by Lee Swee Seng JCA):

> [98] Under s 6(1)(a) of the Limitation Act 1953, the Borrower has six years to bring his action against the bank under contract as represented by the Facilities Agreements from the date the cause of action accrued.
>
> [99] The Federal Court in *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85, explained that: '... time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. A cause of action on a *contract accrues on the date* of breach and in the case of actions founded on contract, therefore, the time runs from the breach'. (Emphasis added.)
>
> [100] It was further clarified as follows: 'This expression, 'cause of action', has

A been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland the time when the debt could first have been recovered by action*. The right to bring an action may arise on various events; *but it has always been held that the statute runs from the earliest time at which an action could be brought*. (Emphasis added.)

B [101] More recently the Court of Appeal in Bounty Dynamics Sdn Bhd (formerly known as *Media Development Sdn Bhd) v Chow Tat Ming & 175 Ors* [2016] 1 MLJ 507; [2015] 9 CLJ 422, held, inter alia that: 'The respondents' claims were time barred under s 6(1)(a) of the Limitation Act 1953. Being founded in contract, the principle of law was that a claim for C breach of contract had to be commenced *at the earliest possible time when the innocent party became aware of the breach*. (Emphasis added.)

[102] See also: *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205; [1982] 1 LNS 12 (High Court) and *Peng Bee Sdn Bhd v Teoh Liang Teh & Ors* [2001] 1 MLJ 1; [2000] 4 CLJ 825 *(Court of Appeal).*

D [103] We are not unaware of the dicta of the Federal Court in The *Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209; [2005] 1 LNS 178, where the court held, inter alia, that:

E > (3) A cause of action founded on contract accrues on the date of its breach and time begins to run from that breach. In the instant case, the claimant's cause of action only arose when the appellant allegedly breached its obligation to pay the claimant his commission in 1986. When the claimant filed his action in court in 1993, the claim had already become time-barred ...

F

[46] In our present suit, it is undisputed or indisputable that the real and substantive vendor is the intervener (SAP Ulu Yam Sdn Bhd), the beneficial owner, and not the original proprietor the defendant (Yayasan Selangor), who G had divested its proprietary interest in the subject-land in favour of the intervener vide the joint venture agreement and the power of attorney. The defendant (Yayasan Selangor) is in reality a nominal defendant in the circumstances of the present case.

H **[47]** In *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697; [2017] 4 CLJ 1, the Federal Court in a judgment delivered by Ramli Ali FCJ after having reviewed and analysed the decided authorities from various Commonwealth jurisdictions held that the doctrine of relation back is not applicable to a co-defendant who was added or joined as a party by way of I an amendment subsequent to the commencement of the action: see para [44]. As held by the Federal Court, the joinder of the co-defendant in the proceedings is to take effect in law on the date of the court order allowing such joinder, and not retrospectively to the date of the commencement of the action against the original defendant: para [44] of the judgment.

[48] Likewise, the intervener (SAP Ulu Yam Sdn Bhd) who applied on 2 October 2020 (vide encl 76) to intervene in the present was ordered to be an intervener by the court order dated 19 October 2020 (encl 87). As such, the date of commencement of the present suit against the intervener is 19 October 2020.

[49] In the present suit, the last extension of time (the ninth extension of time) granted by the vendor expired on 31 December 2011 and when the plaintiff still failed or neglected to pay the balance price, the vendor's solicitor by letter dated 26 March 2013 notified that the sale and purchase agreement shall be terminated unless the balance price was paid by 31 March 2013.

[50] Irrespective of whether the cause of action in specific performance accrues on or shortly after 31 December 2011 (the date of expiry of the last extension of time) or on 31 March 2013 (the ultimatum of the grace period), the plaintiff's cause of action is still barred by the Limitation Act 1953 vis a vis the intervener. A court of equity cannot grant an equitable remedy against the nominal defendant (ie Yayasan Selangor) to compel specific performance of a contract which deprives the real and substantive defendant (SAP Ulu Yam Sdn Bhd) of the latter's beneficial ownership to the subject-land in a situation where the plaintiff's cause of action is barred by limitation period vis a vis the real and substantive defendant. It would be inequitable or unjust for the plaintiff to be allowed to circuitously circumvent the limitation period vis a vis the real and substantive defendant by indirectly suing the nominal defendant and bypassing the real and substantive defendant.

[51] Further or alternatively, even vis a vis the nominal defendant (Yayasan Selangor) the last extension of time ended on 31 December 2011 and if the plaintiff was serious and genuine about challenging the vendor's position on the last extension of time the plaintiff should, within a reasonable time after 31 December 2011, tendered the payment for the balance price and upon the vendor's refusal to forthwith transfer the subject-land in spite of such tender of the balance price, the plaintiff have commenced a court suit for specific performance. In the circumstances, the earliest time the plaintiff could have filed the court suit for challenging the vendor's position and for the remedy of specific performance is not later than the middle of year 2011. In the circumstances, the plaintiff's cause of action accrued in the middle of year 2011 and therefore the present suit filed in September 2018 is barred by the Limitation Act, being filed well after six years from the middle of year 2011.

[52] In the further alternative, a party who seeks the equitable remedy of specific performance should pursue the matter with diligence and expedition, and his suit for equitable remedy of specific performance may be barred by laches.

[53] In *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 the court which held that:

> *Laches is an equitable defence implying lapse of time and delay in prosecuting a claim*. A court of equity refuses its aid to a stale demand where the plaintiff has *slept upon his rights and acquiesced for a great length of time*. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that *it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy*. put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as '*inaction with one's eyes open*'.
>
> Now, can lapse of time and delay, however gross, in a suit seeking final, as opposed to interlocutory relief, of itself amount to the equitable defence of laches. *It is clear that delay in some circumstances can amount to evidence from which the inference can be drawn* that the plaintiff has released (or waived, there seems to be no difference) the claims which he asserts: lapse of time always gives rise to a presumption that a stale suit is ill-founded. *for a reasonable man is not likely to sleep on his claims if they are well-founded*. Whether it does or does not is a question of fact in each case.

[54] The sale and purchase agreement was signed in 2009, about eight years before the date of filing of the present suit in September 2018. Over those years, the positions of the parties have changed and the plaintiff was wound up while the intervener was under liquidation.

[55] The subject-land was sold by the vendor to the plaintiff on 'as is where is' basis and there was no representation as to zoning or planning of the governmental authorities regarding the subject-land.

[56] The original period for completion of the sale and purchase was three months from the date when the plaintiff received a certified true copy of the consent to transfer the subject-land. As the consent to transfer the said land was obtained from Pejabat Daerah/Tanah Hulu Selangor vide letter dated 9 September 2009 (AB 231), the original date for completion of the sale and purchase transaction was 28 December 2009 (AB 69–70, and AB 71). The bulk of the delay was due to the plaintiff's own unilateral act of applying to convert the category of land use from 'Bangunan' (Building) to 'Tanah Perkuburan' (cemetery/burial ground) and appealing against the rejection of such application for conversion even before the balance purchase price was paid (see AA 5–8; AB 162–173). However, the plaintiff's application was rejected by Jabatan Perancangan Bandar dan Desa as the said conversion is contrary to the 'Draf Rancangan Tempatan Hulu Selangor 2020' (AB 232–234).

[57] In the circumstances of the present case, this court finds that the delays of years to the completion of the sale and purchase transaction was due to the plaintiff's repeated and prolonged refusal to pay the balance price until and unless the plaintiff could obtain its planning approval for its unilateral post-contract extraneous terms of developing the subject-land into a burial ground to suit its own commercial purpose. The plaintiff's unilateral imposition of obtaining the planning approval for cemetery or burial ground is unreasonable and was not part of the terms of the sale and purchase agreement. Although the vendor has been very kind in granting nine extensions of time for the completion of the sale and purchase transaction, the plaintiff still adamantly refused or failed to pay the balance price despite the lapse of about nine years. Worse, the plaintiff adopted unfair and intimidating tactics in trying to frighten the vendor into acceding to the plaintiff's unilateral and extraneous terms by threatening to sue the vendor for grossly exorbitant amount.

[58] Over the years of delay, the intervener SAP Ulu Yam Sdn Bhd also went into liquidation.

[59] In the circumstances this court finds that the plaintiff has been guilty of laches and is therefore not entitled to any assistance by the court of equity.

[60] On this ground itself, the plaintiff's action for specific performance should be dismissed.

Issue 3: Whether the defendant's termination of the sale and purchase agreement was valid

[61] Under the sale and purchase agreement, the sale and purchase of the subject-land was on 'as is where is' basis': see cl 1.4 (AB 23) and cl 3.1 (AB 25). This express term of the sale and purchase agreement is not disputed in the present case.

[62] The expression 'as is where is' in the context of sale of property has been judicially explained in various court decisions including those of the Court of Appeal stated below:

(a) in the case of *Fabulous Range Sdn Bhd v Helena a/p K Gnanamuthu* [2021] 5 MLJ 736; [2021] 8 CLJ 1 the Court of Appeal in the judgment delivered by Lee Heng Cheong JCA held that:

> [55] Support can be found in *Chua Moh Huat, Dennis v Harvester Baptist Church Ltd* [1992] 4 CLJ Rep 258, where the Court of Appeal stated as follows:
>
> In our view, that construction is also wrong. Clause 6 served the same

A function as an '*as is where is*' clause in an agreement for the sale of goods, *the purpose of which is to exclude any of the warranties as to merchantability, etc. Implied under legislation relating to the sale of goods. Accordingly, Clause 6 expressly excluded any warranty or condition as to the state and condition of property, and also, in consequence, its fitness for habitation.* (Emphasis added.)

B (b) *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2021] 1 MLJ 322; [2020] 10 CLJ 321 the Court of Appeal in the judgment delivered by Hasnah Mohamed Hashim JCA (now FCJ) held that:

C [35] In the case of *One Visa Sdn Bhd v Telekom Malaysia Bhd* [2015] 7 MLJ 104; [2015] 10 CLJ 569 the court held that:

The plaintiff purchased the lands on the basis of 'as is where is' as evidenced by the proclamation of sale for the public auction. *The application of 'as is where is' was in relation to the plaintiff's purchase of the lands according to its existing condition. The plaintiff ought to have known or was otherwise deemed to have known about the [existence] of the defendant's infrastructure and of any squatters prior to the purchase of the lands … As such, the plaintiff's claim against the defendant for trespass and damages pursuant to it with regards to the presence of the squatters on the lands was without basis and could not be sustained.*

E [36] *We agreed with the learned JC that the entry upon the land cannot be regarded an unjustifiable intrusion as contended by the plaintiff as it was with the consent of the previous owners that the land was surrendered to the third defendant. Thus, we are of the considered view that the plaintiff's claim against the defendants for trespass and for damages is without basis and cannot be sustained.*

[63] The effect of the Court of Appeal's decisions in *Fabulous Range* case is that where there is any warranty implied by legislation which can be excluded G by express contract terms to the contrary, the presence of 'as is where is' clause in the contract is sufficient to exclude the application of the implied warranty from being applicable to the contract. Likewise, the effect of the Court of Appeal's decision in *Bayangan Sepadu* case is that where a person buys a land on 'as is where is' basis, he takes the land with its existing conditions as at the date H of the contract of sale and purchase and there is no implied warranty or representation by the vendor.

[64] In our present case, there is no clause in the sale and purchase agreement to state that the subject-land was suitable for conversion to cemetery or burial I land or for use for any particular type or development. There is also no clause or representation as to the zoning of the subject-land in the government authority's town planning. There is also no term or warranty that the subject-land would not be subject to any future change of zoning or change of category of land use by any government authority.

[65] In the circumstances, the plaintiff has contracted to buy the subject-land on 'as is where is' basis and could not demand for any extraneous term or impose any improvement of term which was not expressly stipulated in the sale and purchase agreement.

[66] In a snapshot, under the terms of the sale and purchase agreement the plaintiff had to pay the balance price within the contractually-agreed time and then take the subject-land 'as is where is' irrespective of whatever future development plan or theme of development it had and irrespective of whatever zoning which the government authority may have for the subject-land. In our present case, the plaintiff has not pleaded a case of frustration of contract due to supervening change of a fundamental term such as change of category of land use by the government authority contrary to the contracting parties' contemplation at the time of making the contract. As such, there is no basis whatsoever for this court to consider whether or not the deposit and interest paid ought to be refunded on ground of frustration of contract.

[67] By unilaterally applying to convert the subject-land from the category of 'Building' to 'Burial Ground', the plaintiff acted contrary to the terms of the sale and purchase agreement.

[68] By refusal or failure to pay the balance price in spite of the nine extensions of time granted in writing by the vendor, the plaintiff-purchaser acted in breach of the sale and purchase agreement.

[69] In the vendor's nine extensions of time granted in writing, the specific extended dates were expressly stated in each and every of the vendor's letters of extension of time. This court accepts DW2's evidence that the contents of all the letters on extensions of time specifically re-fixed the extended time with definite dates for the completion of the sale and purchase transaction, and therefore time for paying the balance price remained the essence of the contract and was not set at large (see p 4 of re-examination of DW2 (encl 139 p 452)). There was no culpable delay on the part of the vendor in respect of the completion of the sale and purchase transaction. The vendor at all material times before the termination of the contract was ready and willing to do its part in the completion of the sale and purchase transaction if the plaintiff were to pay up the balance price and the overdue interest. In the circumstances, this court rejects the plaintiff's contention that the time for completion of the sale and purchase transaction was set at large.

[70] Even if one were to assume that the time for completion of the sale and purchase transaction were, for the sake of argument, set at large the legal consequence is that the new time for the sale and purchase transaction completion would be reasonable time after the expiry of the last extended date

of 31 December 2011. As the sale and purchase agreement stipulates three months after the receipt of the relevant authority's consent for the completion and by 31 December 2011 the relevant authority's consent for transfer had already been received, the reasonable time for completion of the sale and purchase transaction in respect of the subject-land could not exceed three months after 31 December 2011. Nevertheless, the plaintiff-purchaser did not tender any payment of balance price or overdue interest whatsoever in year 2012 or in 2013. The plaintiff-also did not produced any evidence whatsoever of any alleged availability of the funding to pay the balance price and overdue interests.

[71] In a written letter on the extension of time after the government authorities notified the re-zoning of the area including the subject-land into 'forest' land, the vendor made it clear 'That the outcome of the appeal on the rezoning of the above Property shall have no bearing whatsoever on the obligation of the Purchaser to settle the Balance Purchase Price by the Extension Date', and 'that our Client shall not be liable in any way whatsoever howsoever incurred by the Purchaser on issue of the proposed re-*gazetting* of the land status to Forest Reserve or appeals thereto (if any)': (AB 84; AB237; cross-examination of PW3 Leong (encl 139 pp 140 and 153). This was accepted by the plaintiff through its conduct in requesting for more extension of time subsequently: (see cross-examination of PW3 in notes of evidence at pp 132, 134, 137, 140 and 144 of encl 139). By its conduct, the plaintiff requested and obtained extensions of time regardless of the outcome of the zoning of the land: (see cross-examination of PW3 in notes of evidence at p 153).

[72] Clause 9.2 of the sale and purchase agreement (AB 34–35) provides for termination by the vendor in the following words:

> 9.2 Termination by the vendor
>
> 9.2.1 If —
>
> (a) the *Purchaser makes default in the payment of the balance Purchase Price and/or any interest accrued thereon*, if any, in accordance with the provision of this Agreement unless the same shall be attributable to default of the vendor; or
>
> (b) the Purchaser *commits any breach of the terms and conditions* of this Agreement;
>
> (c) prior to the full payment of the Purchase Price, the Purchase enters into composition or arrangement with any of the Purchaser's creditors or *an order is made* or an effective resolution is passed or *any analogous proceedings are taken for the winding up or dissolution of the Purchaser*; or ... the *vendor shall be entitled at their option* EITHER —
>
> (i) ...; OR
>
> (ii) *to terminate this Agreement by notice* in writing served on the Purchaser whereupon —

(1) the *Deposit Sum shall be absolutely forfeited* to the vendor as agreed liquidated damages;

(2) the Purchaser shall at its own cost and expenses *cause the private caveat(s) lodged* by the Purchaser and/or the Financier against the said land *to be withdrawn* within Fourteen (14) days of such termination;

(3) ...;

(4) ...;

and thereafter neither party shall have any further claim against the other on any matter in respect of or arising out of this Agreement.

[73] In the entire circumstances, this court has found and concluded that:

(a) the plaintiff-purchaser was the party which contravened the terms of the sale and purchase agreement by its failures to pay the balance purchase price within the agreed time and by its application to the State Government for changing the category of land use or zoning for the subject land into a burial ground (*tanah kubur*) although the sale and purchase agreement stipulated the subject land was sold on an 'as-is-where-is' basis without any stipulation as to zoning;

(b) despite the plaintiff's repeated failures to pay the balance purchase price, the vendor/intervener granted many extensions of time until 31 December 2011;

(c) when the plaintiff failed or refused to pay up the balance purchase price and late payment interest by 31 December 2011, the vendor was entitled to terminate the SPA subsequent thereto; and

(d) the vendor's termination of the sale and purchase agreement is valid and lawful.

[74] This ground by itself warrants the dismissal of the plaintiff's claims in the present case.

Issue 4: Whether specific performance is impossible or unsustainable

Subissue 4.1: Misconduct in equity

[75] In arguing that the specific performance is impossible or unsustainable in the circumstances of the present case, the defendant submits that the plaintiff was guilty of misconduct in equity and should be given any assistance by the court here.

[76] The Court of Appeal in the case of *Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538 held, inter alia, as follows:

A [14] It is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion. They are by their very nature flexible and meant to be applied in such a fashion as produces a just result on the facts and circumstances of a given case. But there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. *One of*
B *these is that a supplicant who prays in aid equitable assistance must himself or herself be not guilty of equitable misconduct*. This is sometimes put in the form of the maxim: He who comes to equity must come with clean hands. So, *a contract breaker cannot successfully invoke the remedy of specific performance*.

C **[77]** This court has found that the plaintiff is the party who broke the terms of the contract: see paras 53–57 above.

[78] Also, the plaintiff itself has been guilty of misconduct in equity in that:

D (a) the plaintiff repeatedly refused or failed to pay the balance price despite the nine extensions of time granted by the vendor for the completion of the sale and purchase transaction;

(b) the prolonged delay in the proposed transaction was mainly caused by the plaintiff in its unilateral post-contract extraneous terms of
E developing the subject-land into a private cemetery to suit its own commercial purpose;

(c) the plaintiff's unilateral imposition of obtaining the planning approval for cemetery is unreasonable and was not part of the terms of the sale and
F purchase agreement;

(d) although the vendor has been very kind in granting nine extensions of time for the completion of the sale and purchase transaction, the plaintiff still adamantly refused or failed to pay the balance price despite the lapse of years despite the fact that the original date for completion of
G the sale and purchase transaction was merely three months after receipt of the consent for transfer;

(e) worse, the plaintiff adopted unfair and intimidating tactics in trying to frighten the vendor into acceding to the plaintiff's unilateral and
H extraneous terms by threatening to sue the vendor for grossly exorbitant amount; and

(f) in spite of having unfairly pressured or unreasonably extracted from the vendor written extension of time as a result of the plaintiff's unfair and intimidating tactics in successfully frightening the vendor by
I threatening to sue the vendor for grossly exorbitant amount of hundreds of millions of ringgit although the purchase price payable for the subject-land is only RM4,827,600, the plaintiff still refused or failed to pay the balance price of about RM4,344,840 and overdue interest thereon for the completion of the sale and purchase transaction.

[79] In the circumstances this court agrees with the defendant that by reason of the plaintiff's misconduct in equity, this court should not grant the equitable remedy of specific performance to the plaintiff in the present suit.

Subissue 4.3: Whether specific performance is impossible

[80] The second subissue relied upon by the defendant is the argument that the plaintiff's suit for specific performance would also fail as it is unsustainable in law.

[81] The defendant submitted on the Court of Appeal case of *Shirley Koh Gek Ngo & Anor v Tanah Emas Bio-Tech (M) Sdn Bhd (formerly known as Gagnar Bio-Tech (M) Sdn Bhd)* [2014] 6 MLJ 77; [2014] 1 LNS 687 which held as follows:

> [20] Learned counsel for the appellants submitted that by virtue of s 223 of the Companies Act 1965, the *order of specific performance is unsustainable in law* and the learned trial judge had erred in giving the said order.
>
> [21] Section 223 of the Companies Act 1965 states as follows: Avoidance of disposition of property, etc
>
> > 223. Any *disposition of the property of the company* including things in action and any transfer of shares or alteration in the status of the members of the company made *after the commencement of the winding up by the Court shall* unless the Court otherwise orders *be void*.
>
> [22] In support learned counsel cited the case of *Sullivan v Henderson* [1973] 1 All ER 48, wherein the court dealt with s 227 of the UK Companies Act 1948, *which is in pari materia with* s 223 of our Companies Act 1965. In that case one question that arose was whether there was a case for specific performance of a contract for the sale of shares in a company that was made before the commencement of the compulsory winding up of the company, but was *being enforced after the winding up has commenced*. Megarry J held that *the claim for specific performance must fail* for the reason that a court would be reluctant to force specific performance upon the purchaser who had agreed to take a fully effective transfer of the shares, when the transfer, although valid as between the purchaser and the vendor, *would be void against the company*. Accordingly judgment was given for the plaintiff for damages to be assessed.
>
> [23] Learned counsel further cited the decision of this court in the case of *Teo Sing Teck v Yii Chee Ming & 4 Others* [2008] MLJU 930; [2008] 1 LNS 831, a case regarding a petition under s 181 of the Companies Act 1965. In that case Abdul Aziz bin Abdul Rahim J (as he then was) in delivering the judgment of the court followed the principle decided in the case of *Hendrick International Hotels & Resorts Pte Ltd v YTL Hotels & Properties Sdn Bhd & Ors* [2003] 3 MLJ 742; [2003] 1 LNS 239, and held that since the company had been wound up, the s 181 petition was no longer sustainable. In the judgment, the court had also considered s 223 of the Companies Act 1965 and this was what the court said:

A Another compelling reason why the said petition could no longer be maintained after the granting of the winding up order of the said company and the appointment of a liquidator was the provision of s 223 of the Act, which provided that any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the
B company made after the commencement of the winding up by the court shall unless the court otherwise orders be void'. Thus, *in view of this prohibition, the prayers in the said petition requiring the first respondent to purchase the appellant's shares in the said company at a price of RM7,998,000 or at a fair value to be assessed by a firm of independent auditors cannot be entertained* unless sanctioned by the
C court.

[24] Based on the aforementioned authorities, learned counsel submitted that *it is legally impossible to comply with the order for specific performance*.

D **[82]** In *Shirley Koh Gek Ngo* case, Aziah Ali JCA (later FCJ) made the following observation:

[34] Learned counsel referred to s 21(2)(b) of the Specific Relief Act 1950 and submitted that *specific performance is a discretionary remedy and in the exercise of its discretion, the court has to consider hardship and weigh the comparative hardships*
E *between the parties*. Section 21(2)(b) of the Specific Relief Act 1950 states as follows:

21 Discretion as to decreeing specific performance

(1) ...

(2) The following are cases in which the court may properly exercise a discretion
F not to decree specific performance:

(a) ...

(b) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve
G no such hardship on the plaintiff.

[35] The case of *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371; [1988] 1 CLJ Rep 168 was cited in which the Supreme Court said, inter alia, that the power of the court to grant specific performance is discretionary. The remedy of specific performance is special and extraordinary in its character and the court has a
H discretion either to grant it or not. However *the discretion is not arbitrary or capricious discretion but has to be exercised on fixed principles. The conduct of a plaintiff such as a breach on his part may render it inequitable to grant the remedy of specific performance.*

[36] Learned counsel also referred to the case of *K Narendra v Riviera Apartments (P) Ltd* AIR 1999 SC 2309 where at p 2316 the Supreme Court of India said, inter alia:
I

Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no hardship on the plaintiff, is one of the circumstances in which the Court may properly exercise discretion not to decree specific performance.

It was submitted that the learned judge had failed to consider the hardship that would be caused to the appellants to buy back 6 million shares in a Company that had been placed under receivership due to the respondent's breach of its financial obligations. In the circumstances of this case learned counsel submitted that specific performance was not a fit and a proper remedy.

...

[49] We accepted the submissions of learned counsel for the appellants that the company failed for lack of financial support, which triggered the premature resignation of the 1st appellant, which in turn activated the buy-back clause. *It is trite that a party could not be permitted to take advantage of his own wrong as against the other party*.

[50] The basis of the remedy of specific performance lies in equity. Therefore the respondent herein could not rely on the first appellant's resignation to invoke the 'buy back' clause when the resignation was brought about by the respondent's own conduct. In the circumstances, we find *no basis to order specific performance or damages in lieu thereof*.

[83] The following sections of the Companies Act 2016 are also relevant here:

451 Property and proceedings

(1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding up shall be void.

452 Distribution of property of company

Subject to the provisions relating to the preferential payments under this Act, the property of a company shall, on its winding up be applied equally in satisfaction of its liabilities, and shall Companies 413 subject to that application, be distributed among the members according to their rights and interests in the company, unless the constitution otherwise provides

531 Disclaimer of onerous property

(1) Where any part of the property of a company consists of —

(a) ...;

(b) ...;

(c) unprofitable contracts; or

(d) ...,

the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation to the property, may, with the leave of the Court or committee of inspection and subject to this section, in writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as is allowed by the Court, disclaim the property.

A (2) Where any such property under subsection (1) has not come to the knowledge of the liquidator within thirty days from the commencement of the winding up, the power of disclaiming may be exercised at any time within twelve months after he has become aware of the property or such extended period as is allowed by the Court.

B The word 'property' under the Companies Act 2016 has a very wide meaning, and is defined in section of the Act as follows:

'property', in relation to a corporation, includes land, money, goods, *chose in action*, things in action, goodwill and every valuable thing, whether corporal or incorporeal, movable or immovable, and whether situated in Malaysia or elsewhere
C *and also includes obligations*, servitudes, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to the property;

[84] Bearing in mind the immediately foregoing provisions of the
D Companies Act 2016 and the statutory objective of preserving the assets and properties of the company in liquidation which was explained by Vernon Ong FCJ in *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614; [2020] 9 CLJ 449, it would require special
E circumstances before the court should grant an order of specific performance in respect of a land or property which is beneficially owned by the company in liquidation contrary to the wish of the liquidator.

F **[85]** In our present case, the liquidator of the intervener by appointing a solicitor and by intervening to oppose the plaintiff's here herein, has in effect taken steps in the present action to resist the plaintiff's claims herein–steps akin to or having similar effect as a disclaimer of the contract for the sale and purchase of the subject-land. The opposition adopted by the liquidator of the
G intervener in our present case is clear evidence that the liquidator of the intervener does not wish to continue with the sale and purchase transaction after having exhausted their patience with the plaintiff over nine extensions of time and after the plaintiff's prolonged delay of years in paying up the balance price and overdue interests.

H **[86]** In the present case the plaintiff has not established any special circumstance for this court to grant an order of specific performance against the subject-land which is beneficially owned by the intervener-company in liquidation contrary to the wish of the liquidator.

I **[87]** Not only that, the facts and circumstances of the present case are preponderantly against the court's exercise of discretion to grant the specific performance here: see the plaintiff's misconduct in equity discussed in an earlier part of this judgment.

[88] In the premises, this court has held that the plaintiff's claim for specific performance should be dismissed.

[89] As an offshoot of the argument that the plaintiff's claim for specific performance is unsustainable in law, the plaintiff's claim for specific performance should also be dismissed on the ground that the plaintiff has not done its preceding obligation and/or was not, and is still not, ready and willing to perform its part of the contract of sale and purchase.

[90] Under the sale and purchase agreement, the plaintiff-purchaser was under the obligation to pay the balance price and overdue interests to the vendor before the vendor had to cause its solicitor to release the title and transfer documents of the subject-land to the plaintiff-purchaser's solicitor: see cl 6.2.3 thereof (AB 28–29). Making payment of the balance sum by way of cashier or banker cheque in favour of the vendor or the payment of differential sum plus the letter of undertaking from the purchaser's financier addressed to the vendor to release the loan sum must be forwarded to the vendor's solicitor before the vendor's obligation to release the title and transfer documents could arise.

[91] As the sale and purchase agreement involved reciprocal promises and obligations on the part of both contracting parties, the following sections of the Contracts Act 1950 are to be considered here:

> 52 Promisor not bound to perform unless reciprocal promise ready and willing to perform
>
> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.
>
> 53 Order of performance of reciprocal promises
>
> Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.'

[92] In *Shirley Koh Gek Ngo* case, the court of appeal cited the dictum in *Code Focus Sdn Bhd v Tan Chee Hoe & Sons Sdn Bhd* [2013] 4 MLJ 59 where Abdul Malik Ishak JCA stated, inter alia, as follows:

> In our judgment, the reciprocal nature of the parties contractual obligations attract the provisions of ss 52, 53 and 55 of the Contracts Act 1950. Section 52 of the Contracts Act 1950 stipulates that when a contract consists of reciprocal promises which are to be simultaneously performed, the promisor need not perform his promise unless the promisee is ready and willing to perform his promise. For s 52 of the Contracts Act 1950 to apply, the parties must have made promises that are to be performed simultaneously ...

[93] By virtue of the express provisions in cl 6.2.3 of the sale and purchase agreement (AB 28–29), the applicable statutory provision is s 53 of the Contracts Act 1950. In order to properly and effectively complete the sale and purchase transaction, the plaintiff-purchaser has to make payment of the balance sum by way of cashier or banker cheque in favour of the vendor or the payment of differential sum plus the letter of undertaking from the purchaser's financier addressed to the vendor to release the loan sum must be forwarded to the vendor's solicitor first, followed by the vendor's causing the vendor's solicitor to release the title and transfer documents to the plaintiff-purchaser's solicitor.

[94] In our present case, the plaintiff has never tendered any payment of the balance sum (ie the balance price) of part thereof to the vendor. Neither has the plaintiff ever produced any letter of undertaking from any financier to release any loan sum. In fact, the evidence in our present case is that until the date of the trial, the plaintiff has not obtained any loan from any financier to part-finance the purchase of the subject-land.

[95] After the plaintiff's witness PW3 Leong alleged at the trial that he and the other director had the financial means to provide the finance for the plaintiff-company to pay up the balance price and overdue interests, this court gave the liberty to the plaintiff-purchaser to tender payment by bank's cashier order or banker cheque the amount of the balance price and overdue interests as part of the evidence of the plaintiff-purchaser's ability, readiness and willingness to perform its payment obligation under the sale and purchase agreement and as an acid test of his testimonial credibility regarding payment (see notes of evidence on 3 March 2021 encl 139 pdf pp 296–302). The parties' transcript of evidence on 3 March 2021 in encl 139 is unclear and/or incomplete probably due to the imperfect quality of audio recording on that day. On 3 March 2021 and upon having heard and considered PW3 Leong's answers to questions posed by this court regarding the plaintiff's alleged capability and willingness to pay up the balance price together with overdue interests, this court granted the liberty to PW3 Leong and the plaintiff-company to prove it. It was recorded in the handwritten notes of evidence of this court's handwriting as follows:

> plaintiff is prepared to deposit balance purchase price plus interest with joint stakeholder account. plaintiff is prepared to buy the land 'as is where is' and not for 'perkuburan Cina'. After discussions with counsels, liberty is given to plaintiff to deposit balance price plus interests with stakeholder/custodian to prove plaintiff's financial ability and willingness to pay the same if specific performance were granted, and not just empty talk ... Liberty to plaintiff does not prejudice the defendant's argument that this suit is invalid or incompetent or any other argument of defendant or intervener.

Until the date of this court's decision on 21 October 2021 the plaintiff-purchaser and its Directors have failed or neglected to tender any payment nor provide any documentary proof of any such deposit of balance price or overdue interest with any stakeholder or any custodian, despite the liberty granted by this court, and there is no indication whatsoever that they have any realistic plan or desire to tender any payment of the balance price or overdue interests. Many people, including those who are impecunious or poor, has the propensity and tendency to claim by words of mouth that they have the capability to pay millions of ringgit but their verbal claims come to naught until and unless they actually tender the payment by actual bank transfer or banker's cashier order or banker's cheque. Even people who have financial means but are not willing to pay up tend to verbally claim their ability and willingness to pay but fail or neglect to actually pay up. In the circumstances, this court holds that the plaintiff-company (in liquidation) do not have the ability and/or willingness to pay up the balance price and the overdue interests. From the letters exchanged in connection with the extensions of time and the cross-examination evidence of PW3 Leong, this court finds that the plaintiff-company's real intention at all material times was to get the refund of the deposit and some interest payment but not to fork out any money for paying the balance price to proceed with the completion of the sale and purchase transaction.

[96] In the circumstances this court finds and concludes that the plaintiff-purchaser has clearly failed to perform its preceding payment obligation in the present case, and therefore the vendor at all material times had no obligation to cause the vendor's solicitors to release the title and transfer documents to the purchaser's solicitors. As the plaintiff-purchaser has repeatedly failed or neglected to fulfil its obligation to pay the balance price and overdue interests until the date of trial, the plaintiff-purchaser is not entitled to specific performance of the sale and purchase agreement.

[97] Even if s 53 of the Contracts Act 1950 (simultaneous performance of reciprocal promises) were to apply here, the result is still the same. The plaintiff-purchaser was at all material times in default of its payment obligation and even as at the date of trial, the plaintiff-purchaser was not ready and willing to perform its payment obligation: see paras 83 and 84 above.

[98] The plaintiff-company was wound up for RM700,000 debt (as admitted by PW3 Leong in cross-examination on 2 March 2021 at p 8 of cross-examination of PW3) and there is no proof that the plaintiff, a wound up company, has the funds or financial means to pay the balance price together with interests thereon. There is no proof that the official receiver has funds allocated for and is committed towards full payment of the balance purchase price and interest thereof if the court were to grant an order of specific

A performance in the present case. These facts also go to prove that even as at the date of trial, the plaintiff-purchaser was not ready and willing to perform its payment obligation.

B **[99]** In light of the fact that the plaintiff-purchaser has not been ready and willing to perform its payment obligation, the vendor does not have to perform its part by causing its solicitors to release the title and transfer documents to the purchaser's solicitors. On this ground by itself, the plaintiff-purchaser is not entitled to specific performance of the sale and purchase agreement.

C ALLEGED DAMAGES IN LIEU OF SPECIFIC PERFORMANCE

[100] As this court has held that the plaintiff-purchaser is not entitled to specific performance of the sale and purchase agreement, it follows that the D plaintiff is also not entitled to any damages in lieu of specific performance.

[101] As regards the quantum of the alleged damages in lieu of specific performance, the plaintiff-purchaser claimed in the present suit for alleged damages of RM189,820,260.

E

[102] The purchase price under the sale and purchase agreement was RM4,827,600.

F **[103]** The subject-land as at the date of the sale and purchase agreement and as at the date of trial has been land with forest trees on steep hill slopes at height of between 500 metres and 700 metres above sea level In the course of the trial, PW3 Leong stated in evidence that the subject-land at this height and with such steep hill slopes was not suitable for residential development and that was G the main reason the plaintiff-company applied for conversion of category of land use from building to cemetery/burial ground: see evidence on 2 March 2021 including encl 139 pdf p 188 (hard copy p 94) and on 3 March 2021 in encl 139 pdf p 298 (hard copy p 10).

H **[104]** At the trial the plaintiff's witnesses have not adduced any evidence to show what miraculously favourable change has allegedly happened to Hulu Yam area or the subject-land so much so that the land value could have ballooned from RM4,827,600 (the purchase price under the sale and purchase agreement) to RM189,820,260 (the alleged quantum claimed by the plaintiff) I — an increase of about 40 times! It is highly improbable that a land with forest trees on steep hill slopes at height of between 500 metres and 700 metres above sea level at the outlying area of Mukim Hulu Yam and which is unsuitable for residential buildings could have rocketed in value in the manner or extent as alleged by the plaintiff's figure.

[105] In the course of putting pressure upon the vendor to grant extensions of time for the completion of the transaction in the past, the plaintiff-purchaser plucked varying and/or exorbitant figures from the air, as summarised below:

(a) the plaintiff's letter dated 16 March 2011 (AB 98; p 69 of cross-examination of PW3 Leong (encl 139 p 154)) demanding for RM100m, should the vendor opt for termination of the sale and purchase agreement; and

(b) the plaintiff's letter dated 11 November 2011 (AB 271–273) threatening that if the intervener does not allow for extension of time requested, the plaintiff will proceed to file a summons against the intervener for an alleged damages in the exorbitant sum of RM214,500,000.

If the land were to be worth RM100m or RM215m as alleged by the purchaser but the unpaid balance price under the contract of sale is merely less than RM5m, it would be utter foolishness or insanity for the purchaser not to have quickly and easily obtain the money or end-financing for the balance price of less than RM5m to pay off the balance price and get the ownership of the said land. Moreover, the plaintiff-company was wound up for RM700,000 debt (as admitted by PW3 Leong in cross-examination on 2 March 2021 at p 8 of cross-examination of PW3). If the land were to be worth RM100m or RM215m as alleged by the purchaser but the unpaid balance price under the contract of sale is merely less than RM5m, it would be utter foolishness or insanity for the purchaser-company or its directors or shareholders to let the company be wound up for a mere RM700,000 debt!

[106] In the course of the trial here, the plaintiff has not proved the market value of the subject land which has since been gazetted by the State Government as forest land ('hutan darat'). The plaintiff has not produced any valuation report from any licensed valuer regarding the subject land. Whatever figure which the plaintiff used in the past years and in this Suit to threaten the defendant was mere bluff of bloated figures to frighten the defendant into repaying the deposit with interest. It is inherently improbable that the Subject Land, *now gazetted* as forest land ('hutan darat') can have the hugely bloated value which the plaintiff alleges without any proof whatsoever.

[107] It is trite law that the proposition on damages is as follows, as expounded in the case of *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619; [2014] 2 CLJ 773:

> [39] It is trite law that a plaintiff seeking damages in a court of law has the burden of proving both the fact and the amount of damages before he can recover such damages (*Popular Industries Ltd v Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133).

A [40] There must be sufficient data for the court to assess damages. And there must be proof of the damages claimed and not just a mere assertion (*Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; [2010] 1 LNS 206; *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611; and *Ban Chuan Trading Co Sdn Bhd & Ors v Ng Bak Guan* [2004] 1 MLJ 411; B [2003] 4 CLJ 785*).*

[41] In regard to the measure of damages, I had this to say in *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 4 MLRA 68; [2013] 6 CLJ 958, at pp 88 to 89:

C (74) According to Asquith LJ in *Hadley and Another v Baxendale and Others* [1854] 9 Ex 341, 'the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed'.

D (75) What Lord Blackburn said in the context of tort and contract in the case of *Livingstone v The Rawyards Coal Company* [1880] 5 App Cas 25, at page 39, as to the measure of damages ought to be reproduced. There, His Lordship said:

... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

E (76) This short and brief statement of the law by Lord Blackburn has been approved and applied in the following cases:

(a) *Banco de Portugal v Waterlow And Sons, Limited, Waterlow And Sons, Limited v Banco de Portugal* [1932] AC 452, HL, at 474, per F Viscount Sankey LC;

(b) *Monarch Steamship Co, Limited v Karlshamns Oljefabriker (A/B)* [1949] AC 196, HL, at 221, per Lord Wright;

(c) *British Transport Commission v Gourley* [1956] AC 185, at 197, per G Earl Jowitt;

(d) *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, HL, at 420, per Lord Upjohn;

(e) *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 H WLR 819, HL, at 824C, per Lord Wilberforce;

(f) *Swingcastle v Gibson (A Firm)* [1991] 2 AC 223, HL, at 232D, per Lord Lowry; and

(g) *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, HL, at 562G, per Lord Jauncey of Tullichettle. I

(77) While Lord Diplock defined it differently in *Albacruz (Cargo Owners) v Albazero (Owners)* [1977] AC 774*, HL, at 841C in this way:*

... to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so.

[108] In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 Edgar Joseph Jr J (later FCJ) held as follows: A

> I now turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all? With regard to this part of the case, I would preface what I have to say by referring to certain well-established principles. B
>
> *It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages* upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William* 109 ER 842). C
>
> And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* (1825) 2 C&P 109; 172 ER 50 and *Twyman v Knowles* 138 ER 1183.
>
> On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 at p 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] 1 WLR 1731 in which *the plaintiff claiming for diminution of profits of his one-man-business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given.* (See para 345 *McGregor on Damages* (15th Ed)). (Emphasis added.) D E F

[109] In *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672; [1987] 1 LNS 79 Edgar Joseph Jr J (later FCJ) said: G

> This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel* [1948] 64 TLR 177:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; *it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court,* saying: 'This is what I have lost, I ask you to give me these damages. They have to prove it.' (Emphasis added.) H

[110] For proof of market value of a sizeable piece of land, the least which the claimant has to prove is by way of licensed valuer's report substantiated by credible evidence of relevant sale comparables in the same or similar locality, and in an adversarial system, such licensed valuer must also be called as a witness to be cross-examined by the opposite party in the court suit. In our I

present case, the plaintiff has not produced any valuation report for the subject-land and no licensed valuer has been called to testify at the trial. PW3 under cross-examination by the intervener's counsel admitted that there is no document whatsoever to prove the plaintiff's claim of RM189m (see p 3 of cross-examination by PW3 by the intervener (encl 139 p 235)). Whatever figures which the plaintiff used in the course of requesting extensions of time and in the course of the trial here are figures plucked by the plaintiff from the air and throw them at the head of the court. In the circumstances, the plaintiff has miserably failed to prove its alleged quantum of damages in lieu of specific performance. From the conduct of the plaintiff and the the entire circumstances of the present case, including but not limited to the plaintiff's failure to avail itself of the liberty given by this court on 3 March 2021 to prove its ability, readiness and willing to pay the balance price and overdue interests by tendering the payment even at this very late stage (see para 95 above), this court can infer that the plaintiff-company in liquidation knew the subject-land with its steep terrain, its height above sea level and being covered by forest trees and now being zoned as 'forest reserve' is a land which the plaintiff cannot extract much economic value or which cannot be realistically developed in a profitable way.

Issue 5: Whether the plaintiff can claim for refund of deposit

[111] The sale and purchase agreement by cl 9.2.1 expressly provides that in the event of the vendor's termination of the agreement due to any breach r default on the part of the purchaser, the vendor is entitled to forfeit the deposit paid by the purchaser (AB 34–35).

[112] As this court has held that the plaintiff-purchaser was in breach of its payment obligation and that the vendor's termination of the sale and purchase agreement was lawful, the vendor is entitled to forfeit the deposit and has no obligation to refund the same to the plaintiff-purchaser. As the party in breach of the sale and purchase agreement, the plaintiff is not entitled to any refund of deposit. On this ground by itself, it is sufficient to dismiss the plaintiff's claim for refund of the deposit.

[113] As this court has found that there was no valid or binding settlement signed between the parties in the mediation, the plaintiff's alternative claim for refund of deposit pursuant to the alleged mediation settlement is also not sustainable.

[114] In the premises, this court has also dismissed the plaintiff's alternative claim for refund of deposit.

OTHER ISSUES: AGENCY, SIGNING BY PERSON OTHER THAN DIRECTOR AND AUTHORITY OF ATTORNEY

[115] In our present case, the defendant has also raised three other arguments, namely:

(a) the argument that the intervener was not an agent of the defendant when signing the sale and purchase agreement or when negotiating terms of extensions of time with the plaintiff;

(b) the argument that the person who signed the sale and purchase agreement purportedly on behalf of the plaintiff was not a Director of the plaintiff at the time of signing it and therefore the sale and purchase agreement was invalid; and

(c) the argument that the intervener had no authority to sign the sale and purchase agreement or to agree on extensions of time on behalf of the defendant.

[116] In view of the multiple grounds established for dismissing the plaintiff's claims herein and any one of the said multiple grounds is sufficient to warrant a dismissal of the plaintiff's claims herein, this court does not find it necessary to make detailed findings or decision on these three further arguments, except for the following main points stated below.

[117] As the sale and purchase agreement was signed by directors of the intervener and under the company seal, the sale and purchase agreement is valid and binding upon the defendant pursuant to the power of attorney.

[118] However, it is to be noted that the extensions of time were granted by letter signed by an officer of the intervener but in the said letters, there is no notation to state that the signatory of each of the letters was acting as 'Attorney' for the defendant. There is also no document produced by any party in the present suit to show whether or not the signatory of each extension letter was appointed as substitute or additional attorney of the defendant. By law, an appointment of substitute or additional attorney pursuant to the original power of attorney has to be done in accordance with the procedure and formality of a power of attorney. In the circumstances, there is no proof that the extension letters and the terms thereof which were signed by officers of the intervener was signed as substitute or additional attorneys on behalf of the defendant. There is also no Board of Directors' resolution adduced to prove that the intervener had duly appointed the said officers to exercise the powers and functions under the power of attorney. In the premises the extension letters, though they may be binding upon the intervener, are not binding upon the defendant as they were not signed by duly-appointed attorney or substitute or additional attorney.

[119] As regards the argument that the person who signed the sale and purchase agreement purportedly on behalf of the plaintiff was not a Director of the plaintiff at the time of signing it, this court notes that a contract made by a company may be signed by a Director of the company or by an officer other than the Director of the company provided that there is a valid company Board of Director's resolution authorising the signing of the same. There is also the Turquand's rule (or indoor management rule) which presumes that the company has carried out internal authorising process to empower its officer, who has apparent authority, to sign the contract. Turquand rule is used by outsider who deal in good faith with the company to rebut the company's defence of want of authority on the part of the company's officers. In light of the multiple grounds found for dismissing the plaintiff's claims herein, this court finds it unnecessary to delve into the legal issue whether or not when the outsider challenges the company's officer as lacking in authority, whether the company itself can rely on Turquand rule in the circumstances of the present.

CONCLUSION

[120] In conclusion, this court on 21 October 2021 dismissed the entirety of the plaintiff's claims in the present suit with costs and ordered the plaintiff to pay, subject to allocator, costs of RM50,000 to the defendant and costs of RM30,000 to the intervener. This court also ordered that in the event the plaintiff-company (in liquidation) fails to pay the costs of suit, then the contributories and/or the Directors of the plaintiff-company shall be responsible for the costs of the suit.

Plaintiff's claim dismissed.

Reported by K Selvaraju